



S.A.No.17 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.10.2024

PRONOUNCED ON : .01.2025

CORAM:

THE HONOURABLE MR.JUSTICE K.RAJASEKAR

Second Appeal No.17 of 2023

and

Civil Miscellaneous Petition No.459 of 2023

Mr.Dhandapani

... Appellant

Vs.

1.Mr.Rajaram

Mrs.Poorni Ammal (deceased)

2.Mr.P.Gnanavel

3.Mr.P.Kumaravel

4.Mr.P.Palanivel

... Respondents

Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and the decree dated 16.04.2014 in A.S.No.72 of 2011 on the file of the Principal District Court, Villupuram confirming the Judgment and decree dated 14.07.2011 in O.S.No.66 of 2007 on the file of the learned I Additional Subordinate Court, Villupuram.



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For Appellant : Mr. R. Veeramani
For Mr.R.Chakkaravarthy

For Respondents : M/s.Dachayani Reddy,
Senior Counsel
For L.S.M.Hasan Fizal
Assisted by
Mr.B.Abdul Samath

JUDGMENT

The plaintiff has filed this Second Appeal challenging the concurrent finding wherein, both the Courts have held that the plaintiff is not entitled for partition of the suit properties.

2. For the sake of convenience, the parties are referred herein as per their ranking in the Trial Court.

3. The plaintiff and the first defendant are brothers. The second defendant is their sister. A Schedule properties are the ancestral properties in the hands of plaintiff's father namely, Velayudam. From the income earned from A Schedule property, B Schedule properties were purchased and both properties were enjoyed by the plaintiff, defendants and their father



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Velayudam. From the year 1979 onwards, the plaintiff has started residing in various places since he was employed, however, he used to pay ubiquities to his father. Velayudam Padayachi was died on 12.09.1984. Prior to his death, he was having a severe illness for the period of one month and he was not in a fit state of mind. Taking advantage of the plaintiff's absence, the defendants have fabricated a Will as if, the suit properties were bequeathed in their favour. In the month of August 1985, the plaintiff came to know about the Will and issued a legal notice to the defendants as well as his mother and also demanded partition for the suit properties.

4. The defendants by stating various reasons, have dragged the issue for almost 15 years. In spite of elders advise to hand over the plaintiff's share, the defendants have refused to partition hence he has come forward with the suit for partition. Since the properties are ancestral properties and after the death of plaintiff's father, he is entitled for 2/3 share in the suit property. The alleged Will executed by the plaintiff's father is also not true, valid and it will not bind on the plaintiff. Hence he has come forward with



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the suit for partition.

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5. The defendants have contested the suit and they pleaded that the suit properties are not ancestral properties of Velayudam. The plaintiff was working in various places as Village Administrative Officer and never cared about the family. Their father executed a Will in fit state of mind and was hale and healthy. The plaintiff was also fully aware about the execution of the Will and now claims it as forged Will with malafide intention. During lifetime of Velayudam, already the properties were given to the plaintiff. Their mother has also gifted some properties belongs to her in favour of the plaintiff. Even in the absence of Will, the plaintiff has lost his right in claiming partition since the first defendant is in exclusive possession for more than 15 years after denying the rights of the plaintiff and thereby, on the principle of ouster, the plaintiff is not entitled to claim partition. The suit is also barred by limitation, since the suit has been filed after lapse of 15 years. Some of the properties belongs to one Chakravarthy has also been included in the property hence the suit is bad for non-joinder of necessary



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parties.

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6. Based on the pleadings, the Trial Court has framed the following issues:

- “1. Whether the plaintiff is entitled for 2/3rd share in the suit properties?*
- 2. Whether the suit is barred by limitation?*
- 3. Whether the plaintiff is entitled for mesne profits under Order 20 Rule 12 CPC?*
- 4. To what relief?”*

7. The Trial Court has held that the plaintiff has already severed himself from the joint family hence he is not entitled to claim partition as a co-parceners and it has considered the rights of the parties, including the proof and validity of Will and accepted the validity of Will. The Trial Court has further held that the suit is barred by limitation in view of ***Section 110 of the Limitation Act, 1963.***

8. Aggrieved over the same, the plaintiff filed an appeal before the



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District Court, Villupuram and the Appellate Court has re-appreciated the entire evidence and accepted the case of the defendants that the plaintiff was ousted from claiming any right in the joint family properties. The Trial Court has held that the suit properties are ancestral properties and the plaintiff was not entitled for any claim in the share as per **Article 110 of the Limitation Act, 1963** and the Will was not properly proved. However, on the Principle of Ouster, the Lower Appellate Court has confirmed the dismissal of the suit by the Trial Court.

9. Aggrieved over the same, the plaintiff has filed this Second Appeal and this Court at the time of admission, my predecessor has framed the following substantial questions of law.

“a. Whether Will dated 10.01.1984 (Ex.A1) is legal and genuine Will of late Velayuthapadiyachi?

b. Whether the Will Ex.A1, is proved as per requirements of Indian Succession Act as well as Indian Evidence Act?

c. Whether the Art.110 of Limitation Act



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applicable or not, to the facts of this case that after appellant sent notice on 09.08.1985, 1st respondent had not denied to share the properties though defendant and his family members were in continuous possession of property till the filing suit?”

10. The learned counsel for the plaintiff submits that the Lower Appellate Court has already held that the Will has not been proved by the defendants and the same has not been challenged by the defendants. The finding rendered by the Lower Appellate Court is unchallenged and they have only challenged the finding of both the Courts, rejecting the plaintiff's claim of partition by invoking **Article 110 of the Limitation Act, 1963** and same alone is to be considered in this appeal. He further submitted that in the year 1985, they have sent a legal notice to the defendants, calling upon them to partition the co-parcenary properties and the plaintiff has never separated himself from the Hindu joint family. Notice was issued only for demanding partition. Since notice was not replied or the defendants have not disputed the claim of the plaintiff, the principle of ouster or adverse possession is not applicable against the plaintiff herein. Hence, prays to set



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aside the finding that the suit is barred by limitation.

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11. Per Contra, the learned counsel for the defendants submitted that in the year 1985 itself, the plaintiff has demanded partition of the suit properties and he also stated that a Will was executed by the Velayudha Padayatchi in the name of the defendants. This Will is a registered one and the interest of the plaintiff has already been transferred and the defendants were put in possession of the property. This defendants are in exclusive enjoyment based on the registered Will and after effecting mutations. The plaintiff was aware about the mutations as well as the factum of transfer of rights by way of testamentary document by the plaintiff's father in favour of the defendants. The plaintiff is a Village Administrative Officer, who was aware about the consequences of the mutations in the revenue records and also he has voluntarily not challenged the Will though, he came to know about it in the year 1985 itself. He has come forward with the partition suit only in the year 2001, thereby, he has not come forward to exercise his rights over the suit properties and thereby, he has been ousted, and not



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entitled to claim partition in suit properties.

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12. I have considered the rival submissions made on both sides and also perused the records available.

13. Admittedly, the defendant No.1 claimed right over the suit properties based on Ex.A1-Will executed by their father Velayudha Padayachi on 10.09.1984. Ex.A2-Legal Notice issued by the plaintiff is containing various facts and the issuance of the same has been admitted and the plaintiff is fair enough to mark this Legal Notice Ex.A2. It reads as follows:

“Under instructions from my client above named I hereby give you the following notice.

It is represented to me that my client and Nos.1 to 3 of you constitute a Joint Hindu Family. The family owns considerable ancestral properties and from out of the income from the ancestral properties my clients father Velayudha Padachi purchased properties in his name. Though the sale deeds stands in the name of Velayudha



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Padachi all the properties are the joint family properties of late Velayudha Padayachi my client and Nos 1 to 3 of you. The income from the family properties is more than Rs.20000 per year and there is no need to incur debts for the family. In fact Velayudha Padayachi has given monies to the tune of Rs.30,000 to various persons through pronotes. My client's father executed a settlement deed in favour of my client on 16.11.72 and the properties which are described schedule is with Nos 1 to 3 of you. Velayudha Padayachi was suffering from high fever for a month and in fact he was in state of coma a week prior to his death. My client came to understand that Nos 1 to 3 of you pitched upon a plan and foisted a document styled as will in favour of No 2 of you. Velayudha Padayachi died on 11.9.84 in the night. My client's father is a signatory and he was never a thumb impressionist. No 2 of you married Pitchai Padayachi's daughter. My client is working as V.A.O in various places for the past three years and prior to the appointment as V.A.O he was appointed as V.M by the Village Kattuchellur and so my client is out of touch with the family for the ten years and more. My client was not given any money by his father while he was in service on other hand my client was paying amounts often that is as and when demanded by my client's



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father. Nos 1 to 3 of you knew full well that all the properties are the joint family properties. Nos.1 to 3 of you with the help of your yes man namely Sadayan Mottayan alias Kesavan concocted a document styled as will on 10.09.84. The alleged will was not written by Velayudha Padayachi on a sound disposing state of mind. In fact somebody acted like Velayudha Padayachi (impersonating him) and ought to have obtained the documents.

Further after the death of my client's father and ever before the death of my client's father Nos 1 to 3 of you did not treat my client the son of Velayudha Padayachi at all. Because my client's father was not having good health he was made to dance according to the tunes of Nos 1 to 3 of you. The income as already adverted to would be more than Rs.20,000 per year. Nos 1 to 3 of you have got to account at least from the date of the death of my client's father because Nos 1 to 3 of you are swallowing the entire income. All the family properties have got to be divided and my client is entitled to 3/8 share and Nos 1 and three of you are each entitled to one by 8th share . So also in the income my client is entitled to Rs.7,500/- per one year. Now my client came to understand that the recent survey (U.D.R SCHEME) No 2 of



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you obtained the patta in your name for the joint family properties by adopting some underground methods No 2 of you made the surveyor and the survey officials to act according to your wishes and got the patta on your name. The survey officials have no business to transfer the patta in the name of No 2 of you. Taking advantage of the fact that my client is away from the village Nos 1 to 3 of you have acted hastily with the connivance of the survey officials which is atrocious. My client does not want to continue in the joint family because Nos 1 to 3 of you are acting detriment to the interest of my client. Further in the alleged will dated 10.9.84 No.2 of you has included of all the valuable lands. The family has no debts. Nos 1 to 3 of you are attempting to pro-notes in favour of third parties as if, my client's father borrowed. This notice is therefore given to you calling upon you Nos 1 to 3 of you so effect a partition by metes and bounds and allot one such share and year past profits Rs.7,500 within a week from the receipt of the notice failing which suitable legal action would be instituted against you and seek redress with costs and incidental expenses. Further my client has spent more than Rs.500/- for the further and karumadhi expenses of my client's father."

14. Ex.A2-Legal Notice was issued on behalf of the plaintiff to the



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plaintiff's mother Palaniammal, defendants No.2 and 3 and also to the Special Tahsildar, Ulundurpet. In which, he has stated that the plaintiff and his family members constituted joint family and the properties stands in the name of Velayudha Padayachi are the joint family properties of his father, plaintiff, defendants and plaintiff's mother. He has also stated about the Gift Deed executed by Velayudha Padayachi in favour of the plaintiff, dated 16.11.1972 and gifted properties are also in the possession of defendants No.1 to 3. Velayudha Padayachi was suffering from high fever and he was not in fit state of mind at the time of executing the Will in favour of the defendant No.1 herein.

15. The plaintiff further stated that Velayudha Padayachi died on 11.09.1984. Since the plaintiff was working as Village Administrative Officer at various places, he was not in touch with the family for 10 years. The plaintiff has supported the family from his monthly income and the properties purchased in the name of Velayudha Padayachi are all joint family properties. The Will dated 10.09.1984 was fabricated with the help of some



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persons by impersonating Velayudha Padayachi and he came to know that the Pattas were transferred in the name of the defendant No.1, during UDR Scheme, taking advantage of his absence in the Village. He further stated that he does not want to continue in the joint family because the other members of the family are acting detriment to the interest of the plaintiff. Therefore, he demanded partition of the properties by metes and bounds, failing which, he would initiate the suitable legal action.

16. Based on this Legal Notice – Ex.A2 and also after appreciating the evidence of the plaintiff, both the Courts below have held that the plaintiff has failed to enforce his right to claim share in the suit property, within the period of limitation as per ***Section 110 of Limitation Act, 1963***.

17. ***Article 110 of the Limitation Act, 1963*** prescribes that the suit to enforce the right in the share in the joint family property, is 12 years from the date of exclusion becomes known to the plaintiff. It reads as follows:

“ARTICLE 110”



<i>Article</i>	<i>Description suit</i>	<i>Period of Limitation</i>	<i>Time from which period begins to run</i>
110	<i>By a person excluded from a joint family property to enforce a right to share therein.</i>	12 years	<i>When the exclusion becomes known to the plaintiff.</i>

18. The scope of this Section was considered by the Apex Court in ***Govindammal vs. R.Perumal Chellan in (2006 (11) SCC 600)***, and after considering various previous Judgments of Apex Court has held that, non-filing of suit after issuance of legal notice shall not extinguish the right of co-parcener. The plea of ouster or adverse possession, shall be established by leading definite evidence. The evidence must show that the person who pleads ouster or adverse possession, must establish his possession was hostile to the interest of the co-parcener who seeks to explore his right in co-parcenary property. The relevant portion reads as follows:

“8.The defendants in order to oust the claim of the plaintiff took definite plea of adverse possession hostile to the interest of the plaintiff to her knowledge and led evidence to show that a notice was sent by the plaintiff on 2-11-1955 in which she claimed that she was not given any income from the properties of Raju Naidu. Though the plaintiff appeared in the witness box as PW 1, she denied to have sent any such notice. It is alleged that the notice was



sent through the advocate but no such advocate was produced by the defendants. However, the defendants sent a reply to that notice. But the original notice alleged to have been sent by the plaintiff was produced as Ext. B-3 but no advocate was produced to prove that notice. PW 1 has categorically denied to have sent any such notice and she also deposed that after the death of her husband, Raju Naidu, she was thrown out of the house. Though after the death of her husband, for some time she was given income from the properties but thereafter the defendants stopped payment of the income arising out of the properties. She also admitted that some of the properties were (sic given on) usufructuary mortgage. After some time she came to know that certain properties were being sold. Therefore, she woke up in 1979 and filed the present suit. Unfortunately, the plea of the defendants succeeded before the High Court that the notice, Ext. B-3 was given in 1955 and no suit was filed till 1979. Therefore, the High Court took the view that her right in the properties got extinguished because of adverse possession as she gave notice in 1955 and did not take possession of the properties till 1979. Therefore, it was apparent that the possession by Defendant 3 was hostile to her interest. We regret to say that this finding arrived at does not appear to be a correct one. In fact after filing of the suit the notice, Ext. B-3 which she did not pursue any further, her right cannot be extinguished. Though she has denied issuance of such notice through advocate but that is not sufficient to defeat the claim of the widow. This was only an infructuous circumstance that when she was thrown out of the house she could not pursue her legal remedy by filing the suit but when she found that the properties were being sold by the stepsons, and it came to her knowledge, therefore, she woke up to file the suit for asserting her claim. There is no denial that she was the legally married wife of the deceased.



*This has been proved, established and accepted by all the three courts despite the fact that the plea of falsity of the marriage was raised by the stepsons. Once it is established that she was the legally married wife of Raju Naidu she automatically claims her share in the property from the estate of Raju Naidu by way of survivorship. Just because a notice was issued and she did not pursue the same that does not extinguish the claim of the plaintiff thereby giving a handle in the hands of the stepsons by way of adverse possession. In order to prove adverse possession something more is required. Once it is accepted that she was the legally married wife of Raju Naidu then her right to claim partition and share in the property stands out and that cannot be defeated by the plea of ouster or adverse possession. In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case. In the present case, it is the widow who has been thrown out and she has been moving from pillar to post. The relief cannot be denied to her just because she sent notice claiming partition of the properties and she did not file any suit thereafter and the stepsons were holding the properties adversely and hostile to her knowledge. It was the joint property of Raju Naidu and it shall devolve by way of survivorship i.e. two sons and his wife, as the daughter has already given up her share in the property. Therefore, in order to oust one of the co-sharers only on the basis of the so-called notice cannot be deemed to be sufficient to come to a conclusion of adverse possession or extinguishing her rights. In this connection, our attention has been invited to an earliest decision in **Hardit Singh v. Gurmukh Singh** [AIR 1918 PC 1 : 20 Bom LR 1064] wherein it has been held as under: (AIR p. 1)*



“If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members. If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. The evidence of actual user is not sufficient to establish abandonment or exclusion.”

9. Similarly, our attention was invited to a decision in ***Varada Pillai v. Jeevarathnammal* [ILR (1920) 43 Mad 244 : AIR 1919 PC 44]** . In that case, their Lordships quoted the earlier decision referring to the English rule with regard to possession of several co-parceners, joint tenants or tenants-in-common with the possession of others so as to prevent limitation affecting them. In ***Culley v. Doe* [(1840) 11 Ad & E 1008 : 113 ER 697]** their Lordships observed as follows: (ER p. 700)

“Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster. ... And, if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share will



be decided exactly in the same way as if he had brought his ejection for an entirety.”

*10. In **Mohaideen Abdul Kadir v. Mohd. Mahaideen Umma** [ILR (1970) 2 Mad 636] their Lordships held that no hard-and-fast rule can be laid down. But the following relevant factors may be taken into consideration: (i) exclusive possession and perception of profits for well over the period prescribed by the law of limitation; (ii) dealings by the party in possession treating the properties as exclusively belonging to him; (iii) the means of the excluded Co-parcener of knowing that his title has been denied by the Co-parcener in possession. There may be cases, where, owing to long lapse of time, it may not be possible for the Co-parcener in possession to adduce evidence as to when the ouster commenced and how it was brought home to the knowledge of the excluded Co-parcener. In such a case the law will presume ouster as an explanation of the long peaceful possession of the Co-parcener in possession. In order to maintain the person in such possession the law presumes a lawful origin of the possession. Therefore, no hard-and-fast rule can be laid down from which it can be inferred that any Co-parcener has ousted his Co-parcener. That will depend upon facts of each case. Simply long possession is not a factor to oust a Co-parcener but something more positive is required to be done. There must be a hostile open possession, denial and repudiation of the rights of other co-owners and this denial or repudiation must be brought home to the co-owners. Simply because a Co-parcener gave notice claiming partition of the suit properties and possession and did not pursue the matter further, that will not be sufficient to show that the Co-parcener has lost his/her right. In the present case, it is only when ‘B’ schedule properties were being sold by two*



brothers then alone the plaintiff woke up to realize that the stepsons were not interested to give her share in the property and she rushed to file the suit. Therefore, by no stretch of imagination it can be inferred in the present case that the plaintiff had lost her right to claim partition and share in the property.

*“11. In **Vidya Devi v. Prem Prakash [(1995) 4 SCC 496]** the question was whether the plea of acquisition of title by adverse possession was available to the co-bhumidhar or not. In that context, their Lordships held that when no period of limitation is fixed for filing a suit for partition by a co-bhumidhar against his other co-bhumidhars in respect of a joint holding, the question of the other co-bhumidhar acquiring his title to such holding by adverse possession for over 12 years can never arise. It was further observed that if that be so, such plea of perfection of title by adverse possession of a holding by a co-bhumidhar against his other co-bhumidhar as defence in the latter's suit for partition can be of no legal consequence.*

*12. In **Mohd. Baqar v. Naim-un-Nisa Bibi [AIR 1956 SC 548]** it was observed that under the law, possession of one Co-parcener is possession of all co-sharers; it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession and exclusion and ouster following thereon for the statutory period. There can be no question of ouster, if there is participation in the profits to any degree.*

*13. In **Md. Mohammad Ali v. Jagadish Kalita [(2004) 1 SCC 271]** this Court examined a series of decisions on the question of adverse possession and after extracting the legal propositions from various decisions, their Lordships*



concluded that long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a Co-parcener does not amount to ouster so as to give title by prescription. A Co-parcener, as is well settled, becomes a constructive trustee of other Co-parcener and the right of a person or his predecessors-in-interest is deemed to have been protected by the trustees.

*14. As against this, our attention was also invited to a decision in **T.P.R. Palania Pillai v. Amjath Ibrahim Rowther** [AIR 1942 Mad 622 : (1942) 2 MLJ 321 (FB)] . Their Lordships observed that in order to constitute adverse possession, the possession must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. Therefore, in cases of adverse possession also their Lordships have said that the possession should be for longer period and it is known to the competitor that it is held adverse to his knowledge. Their Lordships further held that in cases of usufructuary mortgage granted by one of several co-sharers, if a person remains in possession of the land and cultivates it for years, the requirement of continuity, publicity and extent for adverse possession are fully complied with. But that is not the case here.*

*15. In **Nirmal Chandra Das v. Mohitosh Das** [AIR 1936 Cal 106 : 40 CWN 777] their Lordships observed that in order to succeed on the ground of ouster, the person setting up ouster is bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of 12 years. Their Lordships further observed that there can be no adverse possession by one Co-parcener as against others until there is an ouster or exclusion; and the possession of a Co-parcener becomes*



adverse to the other Co-parcener from the moment there is ouster. Therefore, what is ouster and what is adverse to the interest of the claimant depends upon each case. In this case, a plea was raised that certain properties were (sic given on) usufructuary mortgage. But that was not in a manner to show that these properties are adverse to the interest of the plaintiff. It was only when 'B' schedule properties were sought to be sold and it came to the knowledge of the plaintiff that her stepsons were not interested in partition of the property and giving her share, she filed the suit in the year 1979. Therefore, for the first time in 1979 she came to know that adverse possession is being sought to be established and her interest in 'B' schedule properties is sought to be sold by her stepsons. But in any case, just because she gave a notice and she did not pursue the same, on that basis no adverse inference can be drawn and she cannot be ousted on that count by way of adverse possession."

19. In ***N.Padmamma and Others vs. S.Ramakrishna Reddy and Others (2015 (1) SCC 417)***, Apex Court has once again considered the principles and meaning of the term 'Ouster', 'Adverse Possession' and 'Constructive Possession' and while considering the right of co-owners right over the properties and has held in paragraph Nos.10 and 11 as follows:

"10. It is fairly well-settled principle of law that the possession of a co-heir is in law treated as possession of all



*the co-heirs. If one co-heir has come in possession of the properties, it is presumed to be on the basis of a joint title. A co-heir in possession cannot render its possession adverse to other co-heirs not in possession, merely by any secret hostile animus on his own part, in derogation of the title of his other co-heirs. Ouster of the other co-heirs must be evidenced by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other. (See **Corea v. Appuhamy** [1912 AC 230 (PC)] .) Reference may also be made to the decision of this Court in **P. Lakshmi Reddy v. L. Lakshmi Reddy** [AIR 1957 SC 314] wherein this Court has succinctly summed up the legal position as under : (AIR p. 318, para 4)*

“4. ... But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.”

11. Relying upon the principles stated above, this



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Court in **Bhubaneshwar Prasad Narain Singh v. Sidheswar Mukherjee** [**Bhubaneshwar Prasad Narain Singh v. Sidheswar Mukherjee, (1971) 1 SCC 556**] , almost in similar circumstances held : (SCC p. 561, para 10)

“10. ... In this case we have to consider whether the appellants had laid a claim which a Co-parcener could not put forward except by pleading ouster or any other independent ground. Even if they were in actual Khas possession within the meaning of Section 2(k) of the Act it must be held that the plaintiff who was a Co-parcener was in constructive possession through the appellants as ‘under the law possession of one Co-parcener is possession of all the co-sharers’. We see no reason to hold that the observations of this Court to the above effect in **P. Lakshmi Reddy v. L. Lakshmi Reddy [AIR 1957 SC 314]** are not applicable to the case before us. The appellants do not claim to be trespassers on the property : neither did they claim any title to the lands adversely to the plaintiff-respondent. The deeming provision of Section 6 must therefore ensure for the benefit of all who in the eye of the law would be regarded as in actual possession. It follows that the plaintiff had not lost his share in the Bakasht lands and had a right to them though not as tenure-holder or proprietor but certainly as a Raiyat under the provisions of the Land Reforms Act. The appeal must therefore be dismissed with costs.”

20. In the case in hand, the defendants herein relied on the oral



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evidence of plaintiff as well as Ex.A2 – Legal Notice and other exhibits showing mutation of records. The plaintiff has admitted in his Legal Notice – Ex.A2 that, the defendants have fabricated Will and based on Will, they have also mutated the records after the death of their father Velayutha Padayachi. Though he claimed that, he separated himself from joint family, he sought partition of suit property. According to the plaintiff, the defendants never denied his share instead they gave lame excuses for effecting partition.

21. Admittedly, in this case, the defendants have not given any reply to the Legal Notice-Ex.A2 of the plaintiff seeking partition, denying the right of the plaintiff to seek partition or denying the nature of the property or asserting the defendants right so as to establish that their possession of the suit properties became adverse as against the plaintiff.

22. As observed by the Apex Court in the Judgments cited above, to establish adverse possession of one Co-parcener as against the another, it is



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not enough to show that one of them is in sole possession and enjoyment of the profit of the properties. Since, possession of one Co-parcener deemed to be a possession of another Co-parcener, to establish hostile title against the Co-parcener, there must be ample evidence to show that his possession and enjoyment of defendants is hostile to interest and the knowledge, of the plaintiff, so as to constitute Ouster. The Lower Appellate Court heavily relied on Ex.A2-Legal Notice dated 09.08.1985 and construed that it is a starting point for the exclusion of the hostile possession and from that day onwards the hostile title has to be presumed against the plaintiff. The Lower Appellate Court also relied on the amendment of plaint carried out by the plaintiff to strengthen the finding of ouster.

23. Originally the plaintiff has paid Court Fees by invoking Section 37(2) of the Court Fees Act, 1965 and amended the plaint in the year 2006 by filing I.A.No.1462 of 2005. ***Section 37(2) of the Court Fees Act, 1965*** would applicable to the person, who is in joint possession of the suit property. ***Section 37(1) of the Court Fees Act, 1965*** is applicable for the



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person, who is not in joint possession of the property or out of possession, for valuing Court Fee to institute suit. The Lower Appellate Court has held that by amending the plaint, the plaintiff has accepted that he is out of possession to the suit properties.

24. The defendants claimed that they were in possession and enjoyment of the suit properties exclusively, hostile to the interest of the plaintiff, from the date of issuance of Ex.A2-Legal Notice. They were not able to establish the fact that they exhibited their intention to possess the property against the interest of the plaintiff. On behalf of defendants, defendant No.1 was examined as D.W.1, and he claims that immediately after his father's death, they had mutated the revenue records, based on the Will. The Lower Appellate Court has held that this Will has not been proved and thereby, the defendants are not entitled to claim any right through the Will. The defendants have not challenged this finding. There is no other evidence relied on by the defendants, to claim exclusive right for them. Entire evidence of D.W.1 only shows that, the defendants relied on “Will” to



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deny the share of plaintiff. But no mutation of records in their favour produced.

25. The defendants have claimed that their father and mother have already parted with some of their properties in favour of the plaintiff and his son. They have also marked Ex.B2-Gift deed executed by the plaintiff's father in the year 1972. In the year 1988, the plaintiff's mother has executed the Gift deed -Ex.B3, gifting some of the properties purchased by her. These documents does not contain any condition that the plaintiff shall not demand any partition from their joint family properties.

26. Admittedly, Ex.B6-Patta Pass Book (to show the possession) also still stands in the name of Velayudha Padayachi and there is no evidence to support the case of the defendants that pursuant to the execution of Will they have taken possession of the property and also mutated the revenue records. This strengthened the case of the plaintiff that the defendants were not in exclusive possession, adverse to the interest of the plaintiff. It is also the



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evidence of the plaintiff/P.W1 that the property gifted by the plaintiff's father in the year 1972 under Ex.B2-Gift deed is a sham document, which is executed for the purpose of getting an employment in Postal Department. The plaintiff stated that these documents were not acted upon and he was not given possession of the gifted properties and their properties are also included in the suit properties.

27. The evidence of D.W.1 shows that he was given 4 ½ acres of land while his father was alive, whereas Ex.B6 - Patta Pass Book shows that all the properties are still stands in the name of the plaintiff's father Velayudha Padayachi. Both the Courts below have failed to consider all these factual aspects while recording its finding that the plaintiff was ousted from the co-parcenary.

28. The defendants herein have failed to prove their plea of Ouster or Adverse possession to dislodge the claim of the plaintiff herein. Without



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considering the defence of the defendants solely based on the legal notice, by misreading the same, both Courts have accepted the 'Ouster' and Adverse possession against the plaintiff. The evidence placed by the defendant is not sufficient to constitute the Ouster or Adverse possession. Both Courts failed to follow the principle of Constructive possession i.e., the possession of defendants No.1 & 2 is deemed to be possession of plaintiff also. Thereby, both Courts committed error in invoking **Article 110 of Limitation Act, 1963** in this case.

29. Similarly, it is settled law that quoting wrong provision could not prevent the parties from claiming relief, if they are entitled for the same. By amending the paragraph deals with the Court fees in the plaint, the plaintiff has come forward to pay the Court fees which is more than the Court fees required to be paid by the person, who is in possession of the suit property. Thereby, the plaint is not affected by the payment of deficit Court fees, thereby, the amendment made for amending **Section 37(2) to 37(1) of the Court Fees Act, 1965** has not create any disadvantage to the plaintiff since,



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he had not amended the body of the plaint to the effect that he is out of possession. The entire reading of the plaint would only mean that he claims that he is in joint possession of the properties but he never stated that he is out of possession. Under the said circumstances, the finding that the plaintiff admits that he is out of possession and thereby, Section 110 of the Limitation Act is to be invoked against the plaintiff is not sustainable.

30. In view of the discussions made above, this Court finds that Section 110 of the Limitation Act is not applicable to the present case to defeat the claim of the plaintiff herein and thereby, finding of the Lower Appellate Courts are liable to be set aside and the plaintiff is entitled to claim his share from the suit properties. Accordingly, the substantial question of law No.3 is answered.

31. As far as the other substantial questions of law are concerned, the plaintiff has not challenged the finding rendered by the Lower Appellate Court, which declares that the defendants have failed to prove the Will. It is also to be noted that the defendants have also not challenged this finding



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rendered by the Courts below. Since there is no challenge with regard to this finding, there is no need for once again venturing into the validity of the Will, by this Court. The plaintiff has instituted the suit for partition and claimed 2/3rd share in the suit properties but he has not explained anything as to how he is entitled for 2/3rd share in the suit properties. Admittedly, the plaintiff is one of the son of Velayutha Padayachi and also co-parcener. The defendant No.1 is the brother and the defendant No.2 is his sister. In view of the amendment in **Section 6 of the Hindu Succession Act** by way of the **Hindu Succession (Amendment) Act, 2005** is (**Act 39 of 2005**), the defendant No.2 has equal right in this co-parcenerary property and hence entitled to claim partition.

32. In the result, the Second Appeal is allowed. The Judgment and the decree dated 16.04.2014 in A.S.No.72 of 2011 on the file of the Principal District Court, Villupuram, confirming the Judgment and decree dated 14.07.2011 in O.S.No.66 of 2007 on the file of the learned I Additional Subordinate Court, Villupuram is hereby set aside. The plaintiff is entitled



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1/3rd share in the suit properties. The defendants No.1 and 2 are also entitled for 1/3 share each. The Trial Court is directed to initiate final decree proceedings immediately on receipt of copy of this Judgment and Decree. There shall be no order as to costs. Consequently, the connected miscellaneous petition stands closed.

.01.2025

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Index : Yes / No

Speaking Order : Yes/No

Neutral Citation Case : Yes/No

To

1. The I Additional Subordinate Judge,
Villupuram.
2. The Principal District, Villupuram.
3. The Section Officer,
VR Section, High Court of Madras.

K.RAJASEKAR,J.,

ssi



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Pre-delivery Judgment made in
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